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No. 99-522

In The
Supreme Court of the United States

CITY OF MACEDONIA; JOSEPH MIGLIORINI, IN HIS OFFICIAL CAPACITY AS MAYOR AND JUDGE OF THE CITY OF MACEDONIA MAYOR'S COURT,
Petitioners,

v.

CHRISTOPHER DEPIERO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a person is denied the Fourth and Fourteenth Amendment right against issuance of a warrant when the determination of probable cause and issuance of such warrant is made by a law enforcement officer.

2. Whether a person is denied Due Process of Law under the Fourteenth Amendment to the United States Constitution by being subjected to adjudication and sentencing by a judge who is simultaneously a law enforcement officer.

3. Whether a person is denied Due Process of Law under the Fourteenth Amendment to the United States Constitution by being subjected to adjudication and sentencing by a Mayor of a Municipality acting as judge of a Mayor's Court when such Mayor is the Chief Executive Officer responsible for the financial condition of the municipality or the Chief Law Enforcement Officer of such municipality.

4. Whether a Mayor of a Municipality who is granted final and unfettered discretion by state law and municipal charter as to whether or not to hold and preside over a Mayor's Court is establishing official policy to render the municipality liable under *Monell v. New York Department of Social Services*, 436 U.S. 658 (1978) and its progeny.

PARTIES TO THE PROCEEDING

The parties to this proceeding are:

City of Macedonia; Joseph Migliorini, in his official capacity as Mayor and Judge of the City of Macedonia Mayor's Court,

Petitioners/Defendants below,

and

Christopher DePiero,

Respondent/Plaintiff below

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BRIEF IN OPPOSITION OF RESPONDENT

PREFACE

"No man is allowed to be a judge in his own cause, because his interest would probably bias his judgment, and, probably, corrupt his integrity."

Publius, The Federalist, No. 10 (Madison)

"The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."

Publius, The Federalist, No. 47 (Madison)

"*** the general liberty of the people can never be endangered from [the courts of justice]; I mean so long as the judiciary remains truly distinct from both the legislative and the executive. For I agree that 'there is no liberty if the power of judging be not separated from the legislative and executive powers. And it proves, in the last place, that as liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments;'"

Publius, The Federalist, No. 78 (Hamilton)

"You honor the constitution *** when you take a constitutional question to court; *** The Constitution is not and never could be defined only by judges. ***By spreading the responsibility for upholding the constitution, our forefathers have enlisted a legion of defense for our charter."

Justice Sandra Day O'Connor, Address to the Akron and Stark County Bar Associations' Commemoration of the Bicentennial of the United States Constitution, June 5, 1987.

"If judges were to become the stooges of police departments, it would be the end of freedom as we know it. In those countries where the judiciary is the servant of the police or the military, a dictatorship exists or is in the process of arising. Civil rights and civil liberties are clubbed and shot down in the streets. And die there."

Charles Levendosky, "Federal appeals courts in crisis–justice is delayed", *Casper (Wyo.) Star-Tribune*, October 10, 1999.

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App.1-46) is reported at 180 F.3d 770. The opinions of the District Court (Pet. App. pp. 47-95) are unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 23, 1999. The Petition for Writ of Certiorari was sent by U.S. Mail on September 21, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourth Amendment and Due Process Clause of the Fourteenth Amendment to United States Constitution and Ohio Revised Code § 1905.01 are involved in this case. (Pet. App. pp. 96-98, 103-110)

STATEMENT OF THE CASE

A. Underlying Facts

This case arises out of a civil action brought by Respondent, Christopher DePiero, under 42 U.S.C. § 1983 against Petitioners, City of Macedonia and Joseph Migliorini, in his official capacity as Mayor and Judge of the City of Macedonia Mayor's Court and an additional law enforcement officer who is not the subject of the Petition. In his Civil Rights Action, Respondent DePiero alleged a violation of his Constitutional Rights under the Fourth and Fourteenth Amendments to the United States Constitution. Specifically relevant to the Petition, Respondent DePiero brought federal claims against Petitioners alleging he was denied his right to Due Process of Law under the Fourteenth Amendment to the United States Constitution by being subjected to adjudication and sentencing in the City of Macedonia Mayor's Court by Petitioner Migliorini because Migliorini, as Mayor of the City of Macedonia, is simultaneously a law enforcement officer and the Chief Executive Officer responsible for the financial condition of the municipality. In addition, Respondent DePiero brought a claim for denial of his rights under the Fourth and Fourteenth Amendments to the United States Constitution due to Petitioner Migliorini's determining probable cause and issuing an arrest warrant, as Petitioner Migliorini is a law enforcement officer under State Statute, City Charter and Ohio Supreme Court case law.

On December 4, 1994, a law enforcement officer for the City of Macedonia placed a parking citation on Respondent DePiero's automobile alleging a violation of a codified ordinance of the City of Macedonia. Petitioner City of Macedonia and the law enforcement officer would later concede that Respondent DePiero was not guilty of the charge made in

the citation. Ohio Revised Code §2935.26(B)(4) mandates that all citations contain "An order for the offender to appear at a stated time and place". Ohio Revised Code § 2935.26(B)(6) requires "***notice that the offender is required to do one of the following and that he may be arrested if he fails to do one of them: (a) Appear at the time and place stated in the citation***,". Rule 4(C)(2) of the Ohio Rules of Criminal Procedure requires that the summons contain an order for the defendant "to appear at a stated time and place and inform him that he may be arrested if he fails to appear at the time and place stated in the summons". However, the citation used by Petitioner City of Macedonia and the law enforcement officer did not contain any such information as required under Ohio law. The citation used by Petitioner City of Macedonia contained no information as to how a defendant may contest the charges filed against him or her. Because the citation used by Petitioner City of Macedonia did not contain an order to appear in Court, nor state when to appear to answer such charge, nor contain information on how a person may contest the charge, Respondent DePiero took no action.

Rule 4(D)(3) of the Ohio Rules of Criminal Procedure provides that in a criminal case, the permitted methods for service of process for the summons from which a court acquires personal jurisdiction over a defendant are personal service, residential service by leaving it at the defendant's usual place of residence with some person of suitable age and discretion then residing therein, or by mailing to the defendant's last known address by certified mail return receipt requested. On January 12, 1995, the Clerk of the City of Macedonia Mayor's Court allegedly sent out a summons to Respondent's home address by regular U.S. Mail only, allegedly notifying him to appear in the City of Macedonia Mayor's Court on January 23, 1995. Respondent DePiero never received such summons.

Because the summons issued was not personally served on Respondent DePiero, nor served by residential service, nor by certified mail with return receipt requested, Petitioners City of Macedonia and Migliorini lacked personal jurisdiction over Respondent DePiero to proceed with the case in the City of Macedonia Mayor's Court. Despite his lack of personal jurisdiction over Respondent DePiero, Petitioner Migliorini, acting as judge of the City of Macedonia Mayor's Court, issued a bench warrant on February 7, 1995 for Respondent DePiero's arrest for failure to appear in the City of Macedonia Mayor's Court.[1]

On March 6, 1995, a law enforcement officer from Boston Heights, Ohio stopped Respondent DePiero on an unrelated traffic stop and informed Respondent that an arrest warrant had been issued against him. The law enforcement officer from Boston Heights, Ohio required Respondent DePiero to drive his vehicle in caravan with the police car to the police department of Boston Heights where he was held until unknown law enforcement officers from the City of Macedonia transported Respondent DePiero in handcuffs to the City of Macedonia police department. Respondent DePiero was informed by a law enforcement officer of the City of Macedonia police department that he either had to post a $250.00 cash bond or would be kept in the City of Macedonia jail until his

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[1] "It is axiomatic that for a court to acquire jurisdiction there must be a proper service of summons or an entry of appearance, and a judgment rendered without proper service or entry of appearance is a nullity and void.*** It is thus well-settled that a decision rendered by a court without jurisdiction is unauthorized by law and amounts to usurpation of judicial power."

State of Ohio, ex rel. Ballard v. O'Donnell, 50 Ohio St. 3d 182, 183-84, 553 N.E.2d 650, 652 (1990)

arraignment in the City of Macedonia Mayor's Court. Respondent DePiero posted a $250.00 cash bond and was released by the City of Macedonia police department. Respondent DePiero, unable to persuade anyone from the City of Macedonia police department to provide him a ride back to obtain his car, walked more than six miles in a rainstorm to obtain his vehicle which was left at the Boston Heights police station.

On April 3, 1995, Respondent appeared in the City of Macedonia Mayor's Court and entered a plea of "not guilty" to both the parking and criminal contempt charge filed against him. On April 17, 1995, a trial was conducted in the City of Macedonia Mayor's Court on the parking violation complaint and criminal contempt charge wherein Petitioner Migliorini presided as Judge. Even though both Petitioner City of Macedonia and the complaining law enforcement officer would later concede that Respondent was not guilty of the parking charge filed against him, Petitioner Migliorini found Respondent guilty of the parking charge filed. Even though the City of Macedonia Mayor's Court lacked personal jurisdiction over Respondent DePiero due to lack of service in conformity with the Ohio Rules of Criminal Procedure and Ohio Revised Code and thus lacked even probable cause to find that Respondent had failed to appear in court, Petitioner Migliorini nevertheless found Respondent DePiero guilty of criminal contempt for failing to appear. Petitioner Migliorini imposed a fine of $50.00 on the parking citation and a $100.00 fine on the criminal contempt charge. Respondent DePiero timely filed a Notice of Appeal to the Cuyahoga Falls Municipal Court with the Clerk of the City of Macedonia Mayor's Court. Pursuant to Ohio Revised Code §1905.25, the timely filing of a notice of appeal in a Mayor's Court vacates the conviction and the proceedings in the Municipal or County Court having

jurisdiction are *de novo*. On June 20, 1995, upon motion of the prosecutor for the City of Macedonia, Judge William Pike of the Cuyahoga Falls Municipal Court dismissed both cases against Respondent DePiero.

B. Proceedings Below

On November 14, 1995, Respondent DePiero commenced his civil rights case under 42 U.S.C.§1983 against Petitioners City of Macedonia and Joseph Migliorini, in his official capacity as Mayor and Judge of the City of Macedonia Mayor's Court. The three counts of his complaint relevant to this Petition alleged: 1) Denial of Due Process by Petitioner Migliorini sitting as Judge in the trial of Respondent DePiero's case and by Ohio Revised Code § 1905.01 which authorizes a Mayor of a Municipality to sit as Judge and adjudicate and sentence in a criminal case although such Mayor is simultaneously Judge and the Chief Executive Officer responsible for the financial condition of the municipality and Chief Law Enforcement Officer responsible for enforcement of federal, state and municipal laws (Counts I and II); and 2) Denial of Respondent DePiero's right under the Fourth and Fourteenth Amendments by the determination of probable cause and issuance of an arrest warrant by Petitioner Migliorini because Migliorini is a law enforcement officer by State Statute, City Charter and Ohio Supreme Court case law and was therefore not a neutral and detached judicial officer. (Count III)

On June 19, 1997, the United States District Court in a Memorandum and Opinion denied Respondent DePiero summary judgment on Counts I and II of his complaint and *sua sponte* dismissed count III. In dismissing Count III of Respondent DePiero's complaint, the trial court held that the requirement that probable cause and issuance of an arrest

warrant be determined by a judicial officer who is "neutral and detached" from law enforcement does not apply to the issuance of a bench warrant and that Petitioner Migliorini was a neutral and detached judicial officer, although Petitioner Migliorini is, in accordance with the City Charter, State Law and Ohio Supreme Court case law, a law enforcement officer.

After additional cross motions for summary judgment were filed, the trial court in a Memorandum of Opinion and Order on February 18, 1998 granted Petitioners City of Macedonia and Migliorini summary judgment on Counts I and II of Respondent DePiero's complaint. In granting summary judgment to Petitioners, the trial court held that "***the test for determining whether a judge is neutral and detached for purposes of due process is not the same test applied under the Fourth Amendment for determining whether an individual is a neutral and detached magistrate for purposes of issuing warrants (*i.e.*, that the person be neutral and detached from law enforcement)" and that there was no Due Process requirement of a person being "neutral and detached" from law enforcement to preside as judge over a trial. In addition, the trial court held that even if a Mayor had stated from the bench, "this is one of my guys, he's a good officer and I have no reason to doubt him" it would not with certainty deny Due Process to a defendant but that "this Court would be inclined to conclude that a mayor is partial to the word of a ticketing officer." Respondent filed a timely notice of appeal to the United States Court of Appeals for the Sixth Circuit.

On June 23, 1999, the United States Court of Appeals reversed the District Court on the three counts of Respondent DePiero's complaint that are relevant to the Petition filed by City of Macedonia and Migliorini. In reversing the District Court, the Court of Appeals held that the wide level of executive powers and administrative authority vested in

Petitioner Migliorini resulted in "two practically and seriously inconsistent positions, one partisan and the other judicial" and denied Respondent DePiero Due Process of Law and that Ohio Revised Code §1905.01, although not unconstitutional on its face, was violative of Due Process when the Mayor is vested with wide executive powers. The Court of Appeals also held that the determination of probable cause and the issuance of an arrest warrant must be made by a person who is neutral and detached from law enforcement and that Petitioner Migliorini's wide executive powers and administrative responsibilities precluded him from presiding over Mayor's Court, and thus, his determination of probable cause and issuance of an arrest warrant against Respondent DePiero was a nullity. In addition, the Court of Appeals held that Petitioner Migliorini had final policymaking authority under State law in deciding whether to hold and how to structure a mayor's court and that Petitioner City of Macedonia was therefore not immune for Petitioner Migliorini's deprivation of Respondent DePiero's right to Due Process.

ARGUMENT

I. A person who is a law enforcement officer is Constitutionally disqualified *per se* from sitting as Judge and performing judicial functions.

Petitioner Migliorini is a law enforcement officer under the City of Macedonia Charter[2], State Law[3], and Ohio Supreme Court case law[4]. A person who is a law enforcement officer is constitutionally disqualified under the Fourth and Fourteenth Amendments from performing any judicial functions which would include the determination of probable case and issuance of a warrant or presiding over a court and adjudicating and sentencing in any criminal case.

This Court has consistently held that the guarantee of Due Process in the Constitution of the United States requires in any court where the Constitution of the United States is the Supreme Law, that a judge or magistrate must be neutral and detached from law enforcement and that a person who is a law

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[2] "The Mayor shall be the chief executive officer of the Municipality. He shall: *** 4. Be chief conservator of the peace and cause all law to be enforced."

Article III, § 3.03(4), City of Macedonia Charter

[3] "'Law enforcement officer' means any of the following: A mayor, in the mayor's capacity as chief conservator of the peace within the mayor's municipal corporation."

Ohio Revised Code § 2901.01(A)(11)(c)

[4] "The mayor, as the chief executive of the city, is responsible for law and order in the city and for the enforcement of the city ordinances and all criminal laws of the state and the United States."

In re Removal of Taylor, 172 Ohio St. 394, 399, 176 N.E. 2d 214, 217 (1961)

enforcement officer, as is Petitioner Migliorini, is not a neutral and detached judicial officer and is constitutionally disqualified ***per se*** from simultaneously sitting as judge and performing judicial functions. See, *Johnson v. United States,* 333 U.S. 10, 14-15 (1948); *Coolidge v. New Hampshire,* 403 U.S. 443 (1971); *United States v. United States District Court, E.D. of Mich.,* 407 U.S. 297, 317 (1972)("The Fourth Amendment does not contemplate the executive officers of Government as neutral and disinterested magistrates. Their duty and responsibility are to enforce the laws, to investigate, and to prosecute."); *Shadwick v. City of Tampa,* 407 U.S. 345, 350 (1972)("Whatever else neutrality and detachment might entail, it is clear that they require severance and disengagement from activities of law enforcement."); *Gerstein v. Pugh,* 420 U.S. 103, 117-8 (1975); *North v. Russell,* 427 U.S. 328, 337 (1976)("Our concern in prior cases with judicial functions being performed by nonjudicial officers has also been directed at the need for independent, neutral, and detached judgment, not at legal training. See, Coolidge v. New Hampshire***"); *United States v. Leon,* 468 U.S. 897, 917 (1984)("Judges and magistrates are not adjuncts to the law enforcement team; as neutral judicial officers, they have no stake in the outcome of particular prosecutions."); *Press Enterprises Co. (II) v. Superior Court,* 478 U.S. 1, 10 (1986)("Although grand jury proceedings have traditionally been closed to the public and the accused, preliminary hearings conducted before neutral and detached magistrates have been open to the public."[emphasis added]).

Petitioner Migliorini's role as the Chief Law Enforcement Officer for the City of Macedonia, with the express duty to see that all laws are enforced, is enough by itself to constitutionally disqualify him from acting as Judge of the City of Macedonia Mayor's Court and from performing any judicial function.

II. The Petitioners incorrectly characterize the determination of probable cause and issuance of a bench warrant as a perfunctory act.

The petitioners' assertion that the determination of probable cause and issuance of a bench warrant is a ministerial function (Pet. pp. 10, 17-21) is incorrect as evidenced not only by the federal appellate cases cited by Petitioners, but by additional federal case law. The facts of this case clearly and conclusively establish that the determination of probable cause and issuance of a bench warrant is not a perfunctory act.

Petitioners are correct that the issuance of a bench warrant based upon a defendant's failure to appear does not require the judge or magistrate to appear before a clerk who is neutral and detached from law enforcement and obtain such warrant based upon oath or affirmation. However, this truism is based upon.the presumption that the person who is acting as judge or magistrate and issuing the bench warrant for failure to appear is neutral and detached from law enforcement in the first place as so indicated by federal case law. Thus, while Petitioners cite *United States v. Spencer,* 684 F.2d 220 (2nd Cir. 1982), *cert. denied,* 459 U.S. 1109 (1983) to claim that the issuance of a bench warrant is different from an arrest warrant, the Court in *Spencer, supra,* made clear that the issuance of a bench warrant requires a finding of probable cause by a neutral and detached judge or magistrate.

> "He claims that the bench warrant upon which the search was predicated was issued without a determination of probable cause.*** In this case a New York City criminal court judge issued the bench warrant when appellant failed to appear in court in connection with misdemeanor charges on which he had previously been arraigned. *** The decision of the New York City

> criminal court judge to issue a bench warrant constituted a finding made by a neutral magistrate that Spencer had failed to appear in a pending criminal matter. *** Thus, the presence of the police in the defendant's room was pursuant to a direction made by a neutral magistrate." *United States v. Spencer, supra,* at 222-3

Similarly, the United States Court of Appeals for the Third Circuit has held that probable cause for the issuance of a bench warrant must be made by a "neutral and detached" judicial officer.

> "Pursuant to the indictment, a magistrate issued a bench warrant that same day***
> This "reasonable certainty" requirement both insures that a sufficient showing of probable cause has been made to the executing officer. Because the police are directly "engaged in the often competitive enterprise of ferreting out crime," the fourth amendment requires "that ... inferences be drawn [instead] by a neutral and detached magistrate..." *Johnson v. United States,* 333 U.S. 10, 14, 68 S. Ct. 367, 369 92 L.Ed.436 (1948)"
> *United States v. Doe,* 703 F.2d 745, 746-7 (3rd Cir. 1983)

See also, *Smith v. Tolley,* 960 F. Supp. 977, 991 (E.D. Va. 1997)(following *United States v, Spencer, supra,* holding that bench warrant was valid since determination of probable cause for failure to appear was made by a neutral magistrate.)

Petitioners citing of *United States v. Bennett,* 170 F.3d 632 (6th Cir. 1999)(Pet. P. 20) as being irreconcilable with the Court's decision in this case is also erroneous. In *United States v. Bennett, supra,* the defendant challenged whether the clerk of

the county circuit court was sufficiently neutral and detached from law enforcement. While the Court in *United States v. Bennett, supra,* upheld the issuance of a warrant made by a county circuit court clerk who ran a partisan race to be elected to her post, belonged to the same political party as the Commonwealth's Attorney and had attended some of the same campaign fundraisers as the Commonwealth's Attorney, the Court of Appeals made clear that if such clerk was not sufficiently neutral and detached from law enforcement, the warrant would violate the Fourth and Fourteenth Amendments to the United States Constitution. "By way of clarification, were Ms. Goad not considered neutral or detached, this would necessitate a finding that the state search warrant was constitutionally defective." *United States v. Bennett,* 170 F.3d 632, 637, f. 2 (6th Cir. 1999).

In order to issue a bench warrant for failure to appear, there must be a finding of probable cause that the defendant not merely failed to appear, but was served in accordance with the court rules and statutes which provide the court with personal jurisdiction over the defendant. If there is a failure of service of process due to non-compliance by the court with binding state statutes and court rules as to how service of process may be made, there can never be probable cause against a person for failure to appear. While Petitioner Migliorini claims the issuance of a bench warrant to be a perfunctory act and asks this Court to sanction his action, he fails to properly reveal to this Court that he never had personal jurisdiction over Respondent DePiero at the time he allegedly determined probable cause and issued the bench warrant for Respondent DePiero's alleged failure to appear. The service made by Petitioners City of Macedonia and Migliorini was invalid under controlling and binding Ohio law and Ohio Court Rules and Petitioner

Migliorini cannot deny nor rebut such fact.[5]

Petitioner Migliorini asks this Court to hold that the issuance of a bench warrant is a perfunctory act, although he lacked personal jurisdiction over Respondent DePiero but nevertheless proceeded to issue a bench warrant against Respondent DePiero. Petitioner Migliorini lacked personal jurisdiction over Respondent DePiero due to lack of service of process but still found probable cause and issued a bench warrant and proceeded to act as judge and find Respondent DePiero guilty of criminal contempt for failure to appear. This tyrannical act by Petitioner Migliorini of issuing a bench warrant for failure to appear against Respondent DePiero when Petitioner Migliorini lacked personal jurisdiction over Respondent DePiero, and which resulted in his arrest and detention, should by itself eliminate any scintilla of doubt that the issuance of a bench warrant is not a perfunctory act and that a person who is a law enforcement officer can never be given the authority to sit as judge and determine probable cause and issue <u>any</u> warrant: bench warrant, arrest warrant or search warrant.

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[5] Although Petitioners cite *In re Grand Jury Proceedings Harrisburg Grand Jury 79-1*, 658 F.2d 211 (3rd Cir. 1981) to claim that the issuance of an arrest warrant for an individual who has failed to appear in court after summons was issued by the court clerk is a perfunctory act akin to a ministerial act, it can be noted that, unlike the Mayor's Court which Petitioner Migliorini presided over, the Court in *In re Grand Jury, supra,* had personal jurisdiction over the alleged contemnor as a result of valid service of process and, thus, probable cause to issue a bench warrant for failure to appear.

"An FBI agent served this second subpoena on McNabb in Florida, on March 14. *** Thus, McNabb's simple failure to appear provided the court with probable cause to issue a bench warrant." *In re Grand Jury Proceedings,* 658 F. 2d at 212, 215

III. The Petitioners incorrectly claim that the decision of the Court of Appeals is in conflict with a decision from the Ohio Supreme Court.

While Petitioners claim that the decision issued by the Court of Appeals in this case is in conflict with the decision of the Ohio Supreme Court in *Village of Covington v. Lyle*, 69 Ohio St. 2d 659, 433 N.E.2d 597 (1982), a close examination of *Village of Covington, supra*, reveals that such case defies the Supremacy Clause of the United States Constitution as it conflicts with this Court's decision in *Ward v. Village of Monroeville*, 409 U.S. 57 (1972).

In *Ward v. Village of Monroeville, supra*, this Court struck down the Ohio Mayor's Court system involving a Mayor of a Village acting as judge and presiding over a contested case. In *Ward, supra*, this Court found that:

> "[t]he Mayor of Monroeville has wide executive powers and is chief conservator of the peace. He is the president of the village council, presides at all meetings, votes in case of tie, accounts annually to the council respecting finances, fills vacancies in village offices and has general overall supervision of village affairs." *Ward*, 409 U.S. at 58

Ten years after this Court's decision in, *Ward, supra*, the Ohio Supreme Court issued its decision regarding the operation of Mayor's Courts in Ohio and the constitutional right to Due Process of Law. In *Village of Covington v. Lyle, supra*, the Ohio Supreme Court found that Mayors in Ohio had "diluted executive authority", rather than "wide executive authority" as this court had so found only ten years earlier. This was despite the fact that the State statutes covering a Mayor's executive powers and responsibilities and accompanying duties for the financial condition and law enforcement in Ohio had not changed in the ten years since *Ward, supra*, as so found by the

United States District Court in *Rose v. Village of Peninsula*, 875 F. Supp. 442 (N.D. Ohio 1995).

> "The Ohio statutes that today delineate the expanse of Mayor Ruoff's executive authority are the same statutes as those that defined the village mayor's authority in *Ward*. Mayor Ruoff's executive authority is not diluted, as was the mayor's executive authority in Dugan." *Rose v. Village of Peninsula*, 875 F. Supp. 442, 450 (N.D. Ohio 1995)

The Ohio Supreme Court in *Village of Covington v. Lyle*, 69 Ohio St. 2d at 661, 433 N.E.2d at 599 then relied upon and cited Justice White's **dissenting** opinion in *Ward, supra* and took the case-by-case approach that the dissent in *Ward, supra*, had advocated. By citing a dissenting opinion as the basis for upholding the Mayor's Court structure in Ohio, the Ohio Supreme Court issued a decision contrary to the binding precedent that a decision of this Court has on all state judges.[6] In addition, the Ohio Supreme Court in *Village of Covington v. Lyle*, 69 Ohio St.2d at 663, 433 N.E.2d at 600, viewed this Court's holding in *Ward, supra*, that "Petitioner is entitled to a neutral and detached judge in the first instance" as *obiter dicta*, even though this Court one year after *Ward, supra*, and nine years before *Village of Covington, supra*, reaffirmed such holding in *Gibson v. Berryhill*, 411 U.S. 564 (1973).

Village of Covington v. Lyle, supra, is in conflict with the decision of the Court of Appeals in this case only because *Village of Covington, supra*, violates the Supremacy Clause of Article VI of the United States Constitution. *Village of Covington, supra*, has been rejected by the United States

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6 "This constitution, and the laws of the United States, which shall be made in pursuance thereof, shall be the supreme law of the land; and the judges in every state shall be bound thereby***", Article VI, United States Constitution. (emphasis added)

District Court judges in Ohio who have applied it in cases before such courts. See, *Rose v. Village of Peninsula*, 839 F. Supp. 517, 523 (N.D. Ohio 1993)(Bell, J.)("This court believes that the dissenters in *Covington* have the more correct interpretation of *Ward*."); *Rose v. Village of Peninsula*, 875 F. Supp. 442, 453 (N.D. Ohio 1995)(O'Malley, J.)(This Court finds *Covington* unpersuasive.") A state supreme court decision that defies the Supremacy Clause of the United States Constitution should not serve as the basis for this Court hearing the Petition of City of Macedonia and Migliorini.

Petitioners also claim that the Court of Appeals decision in this case conflicts with this Court's previous decisions in *Tumey v. Ohio*, 273 U.S. 510 (1927); *Dugan v. Ohio*, 277 U.S. 61 (1928); and *Ward v. Village of Monroeville*, 409 U.S. 57 (1972) because the Court found that Petitioner Migliorini's broad reach of executive powers and sweeping administrative responsibilities were enough by themselves to constitutionally disqualify him from acting as judge of the Mayor's Court. However, in so holding, the Court of Appeals directly quoted this Court's decisions in *Tumey, supra*, and *Ward, supra*, that Petitioner Migliorini was in "two practically and seriously inconsistent positions, one partisan and the other judicial." *Ward*, 409 U.S. at 60 quoting *Tumey*, 273 U.S. at 534, by his extensive executive powers and administrative responsibilities. The rationale of the Court of Appeals is consistent with this Court's prior holdings in *Tumey*, 273 U.S. at 532 which was followed in *Ward*, 409 U.S. at 57 that:

> "**Every** procedure which would offer a possible temptation to the average man as judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused denies the latter due process of law." (emphasis added)

In addition, the rationale of the Court of Appeals in this case, that Petitioner Migliorini's dual inconsistent powers were sufficient enough by themselves to deny Respondent DePiero Due Process, is consistent with that of the Court of Appeals in *Commonwealth of the Northern Mariana Islands v. Kaipat*, 94 F.3d 574 (9th Cir. 1996). While denying the constitutional challenge to the Court structure, the Court of Appeals found:

> that this case is closer to Dugan than to Tumey, and that Kaipat has not shown a violation of his federal constitutional rights since the judge had no pecuniary interest in the fine and held no other position that could reasonably warrant a fear of partisan influence on his judgment.*** judges have no executive functions, only judicial functions, judges are not responsible for raising revenue;*** CNMI judges are just judges; they have no other governmental position, and no executive responsibilities. Their functions are entirely judicial.*** Unlike the mayor of North College Hill in *Tumey* and the mayor of Monroeville in *Ward*, CNMI judges have no responsibility for the financial condition of the Northern Mariana Islands and no official motive to improve it. *** Nor do CNMI judges hold any other position that permits them to control municipal or state policy with respect to establishing courts and enforcing particular laws***
>
> *Commonwealth of Northern Mariana Islands v. Kaipat*, 94 F.3d at 575, 580-81 (emphasis added)

"**Every** procedure which would offer a possible temptation to the average man as judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused***", *Tumey, supra; Ward, supra*, (emphasis added) means every time a person occupies "two practically and seriously inconsistent positions, one partisan and the other judicial," Ward, 409 U.S. at 60 quoting Tumey, 273

U.S. at 534, there is a denial of Due Process of Law for the defendant in such judicial proceeding. The decision of the Court of Appeals in this case in which the Court held that Petitioner Migliorini was in "two practically and seriously inconsistent positions, one partisan and the other judicial," and thus denied Respondent Due Process of Law is sound and consistent with this Court's rationale in *Tumey, supra* and *Ward, supra.*

IV. The Petitioners incorrectly claim that Petitioner Migliorini was not establishing official policy in deciding whether to hold and how to structure the Mayor's Court.

Petitioners City of Macedonia and Migliorini acknowledge that "the Mayor has had the discretion to decide whether or not to establish a Mayor's Court in the first instance." (Pet. p. 24) However, Petitioners incorrectly claim that Petitioner Migliorini was not establishing municipal policy when he decided whether to hold and how to structure the Mayor's Court.

The Court of Appeals properly followed this Court's decision in *Jett v. Dallas Independent School District,* 491 U.S. 701 (1989) in:

> identif[ying] those officials or governmental bodies who speak with final policymaking authority for the local governmental actor concerning the action alleged to have caused the particular constitutional or statutory violation at issue.
> *Jett,* 491 U.S. at 737

and correctly found that the Mayor, having unfettered discretion under State Law as to whether or not to hold and how to structure a Mayor's Court, "speaks with final policymaking authority for the City of Macedonia concerning the functions of

the Mayor's Court." As the Court of Appeals correctly held that "[b]y virtue of the breadth of his executive powers and responsibilities, Mayor Migliorini lacked authority to preside over Mayor's Court", and thus denied Respondent DePiero due process of law, it was correctly decided that Petitioner Migliorini's decision to create and hold a Mayor's Court were official policymaking decisions for the City of Macedonia. Although Petitioner Migliorini was granted judicial immunity for his actions, this does not render the decision as to whether or not to hold and structure a Mayor's Court as anything other than official policymaking for the municipality.

Petitioners also incorrectly claim that the decision of the Court of Appeals as to municipal liability is in conflict with *Eggar v. City of Livingston*, 40 F.3d 312 (9th Cir. 1994), *cert. denied*, 515 U.S. 1136 (1995). In *Eggar, supra* at 314, the Court stated that the proper focus was "whether under state law the acts in question were performed under the municipality's or the state's authority" and acknowledged that "A city may be liable for a judge's acts if those acts are in accordance with city policy." *Eggar, supra* at 315. In denying municipal liability, the court held that "a municipality cannot be liable for judicial conduct it lacks the power to require, control, or remedy, even if that conduct parallels or appears entangled with the desires of the municipality." *Id.* at 316 (emphasis added). As Petitioners concede that Petitioner Migliorini "has the discretion to decide whether or nor to establish a Mayor's court in the first instance", they cannot argue that the City of Macedonia through its Mayor "lacks the power to require, control, or remedy" judicial conduct in the City of Macedonia Mayor's Court. As a result, *Eggar supra*, is distinguishable from the facts in this case where Petitioner Migliorini had the final and unfettered discretion as to whether to create and hold a Mayor's Court, and its rationale is consistent with the Court of Appeals decision holding Petitioner City of Macedonia liable as Petitioner Migliorini does have the final, unfettered discretion to control or remedy the constitutional defects in his creating and presiding over the City of Macedonia Mayor's Court.

REASONS FOR DENYING THE WRIT

This Court should decline jurisdiction as this case advances none of the objectives of Supreme Court Rule 10. Petitioners have failed to articulate any compelling reasons for this Court's review. Although Petitioners allege that the decision of the Appellate Court in this case conflicts with a decision of the Ohio Supreme Court and the Ninth U.S. Circuit Court, such claim is erroneous, as addressed and explained in this brief.

At the time of this Court's decision in *Ward v. Village of Monroeville*, 409 U.S. 57 (1972), seventeen states, including Ohio, used Mayor's Courts. With the Court of Appeals decision in this case, no State judicial system remains in the nation where a Mayor with wide executive powers as both the Chief Executive Officer responsible for the financial condition of the municipality and chief law enforcement officer responsible for enforcement of federal, state and municipal law, simultaneously sits and presides over Mayor's Court. As a result, this case has no national implication, application or effect.[7]

The decision of the Court of Appeals was a plainly correct application of the law and follows the rationale used in this Court's establishment of the legal standard that "Every procedure***" includes every time a person occupies "two practically and seriously inconsistent positions, one partisan and the other judicial," there is a denial of Due Process of Law. The decision of the Court of Appeals in this case in which the Court held that Petitioner Migliorini was in "two practically and seriously inconsistent positions, one partisan and the other judicial," and thus denied Respondent Due Process of Law is sound and consistent with this Court's rationale in *Tumey, supra* and *Ward, supra.*

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[7]Although Mayor's Courts do still exist in the State of Louisiana, it is the police chief who is the chief law enforcement officer for the municipality in those municipalities which have a mayor's court. (Louisiana Revised Statute 33 § 423)

CONCLUSION

For the reasons given above, the petition should be denied.

Dated: November 14, 1999.

Respectfully submitted,

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Louisiana Revised Statute 33:423

§ 423 Duties of marshal

A. The marshal shall be the chief of police and shall be ex officio a constable. He shall have general responsibility for law enforcement in the municipality, and shall be charged with the enforcement of all ordinances within the municipality and all applicable state laws. He shall perform all other duties required of him by ordinance. In those municipalities governed by the provisions of this Part, R.S. 33:321 et seq., which have a chief of police elected by the qualified voters thereof, he shall make recommendations to the mayor and board of alderman for appointment of police personnel, for the promotions of officers, to effect disciplinary action, and for the dismissal of police personnel. Such nominations or recommendations are to be made regardless of race, color, disability, as defined in R.S. 51:2232(11), or creed.

B. The provisions of Subsection A of this Section shall not be construed to limit or restrict the provisions of R.S. 33.423.3.